

Markow (Migration) [2019] AATA 3704 (27 June 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Wade Andrew Markow

VISA APPLICANT: Miss Frances Elizabeth Grundy

CASE NUMBER: 1813755

DIBP REFERENCE(S): BCC2017/1321387

MEMBER: Joseph Francis

DATE: 27 June 2019

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211(2) of Schedule 2 to the Regulations
- r.2.03A of the Regulations

Statement made on 27 June 2019 at 3:18pm

1. **CATCHWORDS**

2. *MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional)) – genuine de facto relationship – supporting documents – statements – financial documents – decision under review remitted*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5CB, 5F, 65, 360(2)

Migration Regulations 1994 (Cth), Schedule 2 cls 309.211(2), 309.221, r 2.03A

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 24 April 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
6. The visa applicant, Frances Elizabeth Grundy, applied for the visa on 8 April 2017 on the basis of her relationship with the review applicant (the sponsor). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) of Schedule 2 to the Regulations and that there was not sufficient evidence to demonstrate that the visa applicant was either the spouse or de facto partner of the sponsor, as defined under s.5F and s.5CB of the Act.
8. The Tribunal notes that it was in receipt of substantially more information that was available to the delegate. In reaching its decision the Tribunal did not consider a hearing to be necessary as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
9. The sponsor was represented in relation to the review by his registered migration agent.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the visa applicant is the spouse or de facto partner of the sponsor as defined under s.5F and s.5CB of the Act.

Whether the parties are in a spouse or de facto relationship

12. Clause 309.211(2) and cl.309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claimed to be in a de facto relationship at the time of visa application, and is now married at the time of this decision.
13. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household, and their commitment to each other as set out in r.1.09A(3) of the Regulations, which is attached to this decision. Each of the specific matters

contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

14.

Whether the parties are in a spouse or de facto relationship at the time the application was made

15. The issue in the present case is whether the visa applicant is the de facto partner of the sponsor at the time of application. Statutory declarations dated 2 October 2018 were provided to the Tribunal by both the visa applicant and sponsor. These statements outline the progression of their relationship from when they met in 2010 through to their status as of 2 October 2018.
16. At both the time of application and the delegate's decision, the parties were not married to each other under a marriage that is valid for the purpose of the Act so therefore cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately apart on a permanent basis, and the couple are not related by family: s.5CB(2).

17. Relationship background

18. The visa applicant is a 33-year-old citizen of the United Kingdom (UK).
19. The sponsor is a 41-year-old Australian citizen.
20. The sponsor provided a copy of the Department's decision record with the application.
21. The parties claim to have first met in 2010 through a mutual friend. They claim to have entered into a committed relationship in February 2015 and began a de facto relationship on 15 July 2015.
22. Further documented evidence in support of the application was also provided, including financial records, receipts from shared expenses, and photographs of how their relationship is portrayed to family and friends.
23. The Tribunal finds on the evidence that the parties are not related by family.

Are the other requirements for a spouse relationship met?

24. The Tribunal has before it the delegate's decision which was submitted by the sponsor to the Tribunal. The Tribunal has had regard to detailed written submissions made on behalf of the sponsor by his representative and documentary evidence submitted to the Tribunal. The Tribunal also has before it the Department's file relating to the visa applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it. This material includes:
 - Bank Account Statements
 - Utility accounts
 - Statement from Sharon Kerr dated 10 September 2018

- Statement from Susan Grundy dated 9 September 2018
- Statutory Declaration from Samantha Long Dated 20 August 2018
- Statutory Declaration from Geordie Mathews dated 22 August 2018
- Copies of Facebook media updates and exchanges
- Joint Bank Account Statements in the name of the sponsor and visa applicant
- Residential Tenancy Agreement in the name of the sponsor and visa applicant
- Receipts for joint travel and accommodation
- Various photographs of the sponsor and visa applicant
- Valid Marriage Certificate from Western Australia dated 19 June 2018
- Wedding Ceremony program and transcript
- Various receipts for wedding ceremony and services
- Superannuation Account Beneficiary notification
- Statutory Declaration of sponsor, Andrew Markow, dated 02 October 2018
- Statutory Declaration of visa applicant Frances Grundy dated 02 October 2018

25. *Financial Aspects*

26. The Tribunal considered the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of any pooling of financial resources, any legal obligations owed, and any sharing of day-to-day household expenses.
27. The Tribunal finds that the parties have significant shared financial interests, including rental obligations, shared bank accounts, utility service accounts for a shared household, and superannuation.
28. The Tribunal places weight on the evidence provided with regard to pooling of resources through joint bank statements and the sharing of household expenses.
29. The Tribunal finds that the visa applicant and sponsor have a relevant pooling of financial resources, including through sharing of day-to-day living expenses as evidenced by a rental tenancy contract and utility accounts provided.

30. *Nature of the household*

31. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of the responsibility for the housework. The parties have no children together.
32. The parties have been able to establish a shared household in Western Australia which is evidenced by a Rental Tenancy Agreement in joint names, various receipts for household goods, and social media indicating a sharing of interests and housework.

33. The Tribunal places weight on the evidence provided with regard to the established shared household in Western Australia. The Tribunal finds that the nature of the parties' household is such as would indicate a genuine de facto relationship from 15 July 2015.

Social aspects of the relationship

34. The Tribunal has had regard to the evidence provided as to whether the parties represented themselves to others as being in a de facto relationship from 15 July 2015, the opinion of their friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
35. The parties provided supporting material including a number of supporting statements from family and friends.
36. Mrs Susan Grundy, the visa applicants' mother, provided a statement attesting to the genuine and continuing relationship between her daughter and the sponsor. Additional statements were submitted from other parties supporting the genuine and continuing relationship. Those statements are detailed above. The Tribunal places weight on the third party statements provided in support of the relationship.
37. A number of photographs submitted to the Tribunal show the parties in various social settings, travelling together, and in the company of friends in various locations. These indicate that the parties present themselves to both their families and friends as being in a genuine and continuing relationship.
38. The Tribunal places weight on the evidence provided with regard to how the parties present themselves to others.
39. The Tribunal considered the evidence provided as to the social aspects of the relationship, including whether the parties represented themselves to other people as being in a genuine relationship, the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
40. The Tribunal finds, based on the supporting documentary evidence and in the context of these circumstances, that the parties represent themselves socially in a manner consistent with a genuine and committed de facto relationship.
41. The Tribunal considers the social aspects of the visa applicant and sponsor's relationship to be indicative of a genuine and continuing relationship at the time of application and that this has been so since 15 July 2015.
42. The parties met in the UK through a mutual friend in 2010. The Department's movement records show the visa applicant visited Australia in 2011, and had multiple arrivals and departures between 2016 and 2018.
43. The Tribunal finds that the parties have been in regular contact and derive a level of companionship and emotional support from one another and clearly see the relationship as long-term as evidenced by subsequent marriage and their family plans. In this regard, the Tribunal places significant weight on the evidence contained within the statements provided by both the visa applicant and sponsor, including the fact that they are now married to each other.
44. The Tribunal finds that the visa applicant's and sponsor's commitment to each other is significant, with consideration to the length of time they have affirmed they have been in a de facto relationship.

45. The Tribunal considers the nature of the visa applicant's and sponsor's commitment to each other to be clearly consistent with a genuine and continuing de facto relationship at the time of application.
46. The Tribunal has considered all of the circumstances of the relationship including the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other.
47. Having considered all the circumstances of the relationship the Tribunal is satisfied that at the time of application the visa applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others; the relationship between them is genuine and continuing; they live together and not separately and apart on a permanent basis; and they are not related by family.
48. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made.
49. Therefore, the visa applicant meets cl.309.211(2).

50. Are the additional criteria for a de facto relationship met?

51. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A of the Regulations. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the visa applicant and the sponsor were at least 18 years old.
52. Further, the visa applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the visa applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
53. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. Based on the evidence before it, the Tribunal has found that the parties have been in a de facto relationship since 15 July 2015. Accordingly, the Tribunal is satisfied that the visa applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
54. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
55. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

56. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211(2) of Schedule 2 to the Regulations
 - r.2.03A of the Regulations

Joseph Francis
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).